

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

76-7574

ORIGINAL

To be argued by
MATHIAS L. SPIEGEL

In The

United States Court of Appeals

For The Second Circuit

BLECKER and RUTH BLECKER,

Plaintiffs-Appellants,

-against-

ARD FRERES & CO., MEDIOBANCA BANCA di
CREDITO FINANZIARIO-SOCIETA PER AZIONI, LES
FILS DREYFUS ET CIE, S.A., LAZARD FRERES ET CIE,
INTERNATIONAL TELEPHONE AND TELEGRAPH
CORPORATION, RICHARD E. BENNETT, EUGENE R.
BLACK, RAYMOND L. BRITTENHAM, GEORGE R.
BROWN, FRANCIS J. DUNLEAVY, RUSSELL F.
ERICKSON, HAROLD S. GENEEN, ARTHUR M. HILL, J.
PATRICK LANNAN, R. NEWTON LAUGHLIN, JOHN A.
McCONE, RICHARD S. PERKINS, HART PERRY,
WARREN LEE PIERSON, FELIX G. ROHATYN, TED B.
WESTFALL,

Defendants-Appellees.

BRIEF FOR PLAINTIFFS-APPELLANTS

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UNITED STATES GOVERNMENT

Memorandum

TO : Counsel Wishing to File More Than
Ten (10) Copies of Briefs on Appeal

DATE: January 20, 1976

FROM : A. Daniel Fusaro, Clerk, United States Court of Appeals, 2nd Circuit

SUBJECT:

Effective immediately, this court will file a maximum of ten (10) copies of all briefs on appeal.

The additional fifteen (15) copies of the briefs required to be filed by counsel by Rule 31(A) F.R.A.P. shall be retained by counsel subject to the call of the court for whatever use it may direct until final disposition of the action.



5010-119

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In The
United States Court of Appeals
For The Second Circuit

No. 76-7574

LOUIS BLECKER & RUTH BLECKER,

Plaintiffs-Appellants,

vs.

LAZARD FRERES & CO., MEDIOBANCO BANCA di
CREDITO FINANZIARIO-SOCIETA PER AZIONI, LES
FILS DREYFUS ET CIE, S.A., LAZARD FRERES ET CIE
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WARREN LEE PIERSON, FELIX G. ROHATYN, TED B.
WESTFALL,

Defendants-Appellees.

*On Appeal from the United States District Court for the
Southern District of New York*

BRIEF FOR PLAINTIFFS-APPELLANTS

STATEMENT OF THE ISSUES

1. Is the failure of the District Court to decide the motion to vacate the stay, within the framework of this suit, an abuse of discretion?

2. Is the failure of the District Court to decide the motion to vacate the stay, in face of the opinion and order of the District Court of Connecticut in *Herbst v. ITT*, Civ. No. 15,155, an abuse of discretion?

3. Does the proposed settlement of *Shapiro v. E.R. Black*, Supreme Court, State of New York, County of New York, Civ. No. 20191/76, render the stay immoderate and unlawful?

4. Was the refusal of the District Court to enjoin the defendants from pleading any judgment entered in *Shapiro v. E.R. Black* and related cases executed thereto in bar of this action, error?

5. In the interest of justice, should this action be transferred to the District of Connecticut?

STATEMENT OF THE CASE

This is an appeal from an order of the United States District Court for the Southern District of New York denying by endorsement plaintiffs' motion for an order enjoining the International Telephone & Telegraph Corporation ("ITT"), its directors and parties acting in concert with them from taking any action that might compromise the claims asserted in this suit, during the pendency of plaintiffs' motions for (a) leave to file an amended and supplemental complaint ("pending complaint") and (b) to vacate the stay of this suit, and further; enjoining defendants from pleading in bar of this suit any judgment that might be obtained in *Shapiro v. E.R. Black, et al.*, Supreme Court State of New York, County of New York, Civ. No. 20191/76 (A183).

The opinion of the United States District Court for the District of Connecticut in *Herbst v. ITT, et al.*, Civ. No. 15,155, is reproduced at A186 through A211 of the Appendix. Two months after the entry of Judge Blumenfeld's opinion and order in *Herbst v. ITT*, the defendants announced a settlement in *Shapiro v. E.R. Black* (A227) which seeks to terminate this suit and all other derivative suits arising out of the merger of the Hartford Fire Insurance Company into ITT (A275-A283). Plaintiffs then sought the order appealed from.

Argument was held on the question on October 29, 1976 and thereto plaintiffs requested that the District Court decide their pending motions. The District Court denied the relief sought by plaintiffs without prejudice to its being renewed if the suit was transferred to the District of Connecticut. On November 1, 1976 plaintiffs were advised by chambers of the District Judge that Judges Conner and Blumenfeld had spoken and the suits were to be transferred to the District of Connecticut on the Court's own motion (A313-A317).

On November 12, 1976 the District Court held a hearing on the transfer to the District of Connecticut of the related suit, *Bernstein v. Mediobanca, et al.*, 73 Civ. 3549 (WCC). All parties in *Bernstein v. Mediobanca* opposed the transfer and the District Court reversed its decision to transfer this suit to the District of Connecticut (A313-A317).

On December 23, 1976 plaintiffs wrote to the District Judge (A325-A327), referring to an order of Mr. Justice Gellinoff dated November 22, 1976 (A328-A330) and the ongoing settlement proceedings in *Shapiro v. E.R. Black*. Plaintiffs requested that the District Court decide the pending motion to vacate the stay of this action prior to argument of this appeal.

STATEMENT OF FACTS

This is plaintiffs-appellants' third attempt to have this Court review the stay of this action during the pendency of *Bernstein v. Mediobanca, et al.*, 73 Civ. 3057 (WCC) (A6), which suit alleges derivatively on behalf of ITT a claim similar to one of the claims contained in this suit, but does not name the directors of ITT as parties defendant. The claims in both actions arise out of the merger of the Hartford Fire Insurance Company into ITT. *Boehm v. Bennett*, Civ. No. H76-215 U.S. District Court, District of Connecticut, commenced after this suit, alleges a claim similar to another claim contained in this suit derivatively on behalf of ITT. *Herbst v. ITT*, commenced prior to this suit, alleges class action claims arising out of the transactions in suit. Subsequent to the suits in the federal court, on March 15, 1974, a summons and complaint was served but never filed in the Supreme Court, State of New York in *Shapiro v. E.R. Black*, alleging a claim similar to that contained in this suit and in *Boehm v. Bennett*. This suit was commenced on September 21, 1973. Prior to answer ITT obtained the stay (A6). Following the District Court's denial of plaintiffs-appellants' motion for reargument and request for an evidentiary hearing, asserting a conflict of interest between *Bernstein v. Mediobanca* and *Herbst v. ITT* (A7-A10), plaintiffs-appellants unsuccessfully sought to mandamus Judge Tenney.

On March 6, 1974 the Internal Revenue Service revoked its ruling that the Hartford-ITT merger was a tax-free event. On March 11, 1974 plaintiffs-appellants filed an amended complaint as a matter of right and moved to name the ITT directors as parties defendant. On the same day, the complaint in *Boehm v. Bennett* was filed in the Southern District of New York. Plaintiffs-appellants then moved to vacate the stay asserting a fraud upon the Court with respect to the inception of the stay. Following the District Court's denial of plaintiffs-appellants' motion (A11-A18), an appeal was noticed and this Court then granted ITT's motion to dismiss the appeal on the ground that the order appealed from was interlocutory.

In March of 1976 ITT announced a settlement in *Herbst v. ITT* (A67-A70). The stipulation of settlement entered into thereto (A71-A79) provided that ITT was to execute and deliver to its directors, releases which the directors intended to plead in bar of this suit, *Boehm v. Bennett*, *Shapiro v. E.R. Black* and another state court proceeding (A77).

At a pre-trial conference held on April 9, 1976 plaintiffs-appellants sought permission from the District Court to move for leave to file the amended and supplemental complaint ("pending complaint"). The District Court told plaintiffs-appellants to proceed first in *Herbst v. ITT* before it would entertain their proposed complaint.

Plaintiffs-appellants then filed objections to the proposed settlement in *Herbst v. ITT* (A80-A87). In response to plaintiffs-appellants' objections in *Herbst v. ITT*, counsel in *Bernstein v. Mediobanca* filed an affidavit in response to the proposed *Herbst v. ITT* settlement (A137-A146). Plaintiffs-appellants thereupon moved for leave to file the amended and supplemental complaint (A19-A64) and annexed that complaint to a supplemental affidavit filed by them in the District of Connecticut in opposition to the proposed *Herbst v. ITT* settlement (A147-A150). Thus, the allegations of fraud in the inducement of the stay, and the allegations that the stay and the proposed *Herbst v. ITT* settlement were part of a conspiracy to avoid inquiry into plaintiffs-appellants' claims, were before Judge Blumenfeld.

Plaintiff in *Boehm v. Bennett* did not oppose the proposed settlement in *Herbst v. ITT* (A160-A164). In order to effect the proposed settlement in *Herbst*, *Boehm* was transferred, on consent, to the District of Connecticut (A156-A159) and the *Boehm* plaintiffs moved to dismiss as to the ITT directors (A165-A169). *Boehm v. Bennett* was the vehicle through which the settlement in *Herbst v. ITT* as proposed was to be effected (A160-A164).

Following the *Boehm* motion to dismiss as to the ITT directors, plaintiffs-appellants on July 26, 1976 moved to vacate the stay (A151-A155). On August 11, 1976 Judge Blumenfeld handed down his opinion and order in *Herbst* (A186-A211) sustaining plaintiffs-appellants' objections. Thereafter on October 12, 1976 the defendants announced a proposed settlement, of all of the claims contained in the derivative actions arising out of the Hartford-ITT merger, not negotiated with plaintiffs-appellants and entered into without their consent (A313-A317).

On November 4, 1976 an index number was obtained in *Shapiro v. E.R. Black*.

On November 22, 1976 the Hon. Abraham J. Gellinoff, a Justice of the Supreme Court of the State of New York, signed an order on consent allowing plaintiffs in *Bernstein v. Mediobanca* and *Boehm v. Bennett* to intervene as parties plaintiff in *Shapiro v. E.R. Black* and granted leave to the parties to file an amended and supplemental complaint as a joint pleading (A328-A330). That pleading adopted the claims in this suit without the permission and consent of plaintiffs-appellants.

On November 29, 1976 and again on December 6, 1976 hearings were held on the proposed settlement in *Shapiro v. E.R. Black*. Plaintiffs-appellants appeared at the hearings for the limited purpose of advising the Court of this appeal and that in view of the allegations in their pending complaint of a conspiracy to avoid judicial inquiry into plaintiffs' claims the settlement should not proceed without their participation and consent.

ARGUMENT

I.

The failure of the District Court to act upon plaintiffs' motion to vacate the stay after intervention in *Shapiro* by plaintiffs in *Bernstein* and *Boehm* is an abuse of discretion.

Stays of indeterminate duration are immoderate unless so framed in their inception that their force will be spent within reasonable limits. *Landis v. North American Co.*, 299 U.S. 248, 257 (1936); *Dellinger v. Mitchell*, 442 F.2d 782, 786-7 (D.C. Cir. 1971).

The District Court in Connecticut having sustained appellants' objections to the settlement in *Herbst v. ITT*, the continuation of the stay after the intervention in *Shapiro v. E.R. Black* of plaintiffs in *Bernstein v. Mediobanca* and *Boehm v. Bennett* (A325-A330), is beyond the reasonable limits of the stay (A325-A327). *Landis*, *supra* 299 U.S. 256-7. *See, Brendle v. Smith*, 46 F. Supp. 522, 524-5 (S.D.N.Y. 1942). In the framework of these suits, the intervention contravenes equity. *See, PPG Industries, Inc. v. Continental Oil Company*, 478 F.2d 674, 682-3 (5th Cir. 1973).

II.

The stay cannot be used to deny the well pleaded allegations of the pending amended and supplemental complaint.

Leave to amend shall be "freely given when justice so requires" *Foman v. Davis*, 371 U.S. 178, 182 (1962); Rule 15(a) Fed. R. Civ. P. The well pleaded allegations of the pending complaint cannot be ignored. *Shapiro v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 353 F. Supp. 264, 268 (S.D.N.Y. 1972), *aff'd.*, 495 F.2d 228 (2d Cir. 1974). It alleges fraud upon the District Court in the inception of the stay (A33-A38); it alleges

that the stay and the settlement in *Herbst v. ITT* as proposed, are part of a continuing conspiracy to avoid judicial inquiry into appellants' claims (A38). To continue the stay in face of the settlement proceedings in *Shapiro v. E.R. Black* opens appellants to risks that equity should not countenance. See, *Landis, supra* 299 U.S. 255. Appellants are strangers to the state court litigation, cf. Opinion of Judge Blumenfeld, footnote 25 (A209). Appellants invoke equity in the District Court and seek to have the litigation against ITT arising out of the claims in suit disposed of under the aegis of the District Court (A60-A61). See, Opinion of Judge Blumenfeld, footnote 26 (A210).

III.

In the framework of these suits the denial by the District Court of appellants' application for a temporary restraining order and preliminary injunction was error.

Judge Blumenfeld recognized (A200-A201), that the impact of a proposed settlement upon collateral actions had to be considered by the District Court. *Stella v. Kaiser*, 218 F.2d 64 (2d Cir. 1954), *rehearing denied*, 221 F.2d 115 (2d Cir.), *cert. denied*, 350 U.S. 835 (1955); *Masterson v. Pergament*, 203 F.2d 315 (6th Cir.), *cert. denied*, 346 U.S. 832 (1953).

In face of the holding of Judge Blumenfeld (A210-A211), and the allegations of appellants' pending complaint, the refusal of the District Court to grant the relief sought was error. Compare *Breswick & Co. v. Briggs*, 135 F. Supp. 397 (S.D.N.Y. 1955) with *Jacobs v. Tenney*, 321 F. Supp. 937 (S.D.N.Y. 1970). This Court may substitute its judgment for that of the District Court even though the latter's action was not arbitrary and capricious. See, *PPG Industries Inc.*, *supra* 478 F.2d 682. In any event this Court has the capacity to act. *Dellinger, supra* 442 F.2d 788-90. In conjunction with its failure to act on the pending motions the order of the District Court operates in practical effect as a final order. *Idlewild Bon Voyage Liquor Corp. v.*

Epstein, 370 U.S. 713, 715 n.2 (1964). There must be a new appraisal of the facts by this Court in light of the existing situation. *Landis*, *supra* 299 U.S. 258.

IV.

The suit should be transferred to the District of Connecticut.

In the interests of justice this suit should be transferred to the District of Connecticut, 28 U.S.C. §1404(a). In refusing to approve the stipulation of settlement in *Herbst v. ITT*, Judge Blumenfeld said:

"However, the Court may be willing to reconsider this decision at a later time, if developments in *Boehm v. Bennett* or any of the other derivative suits appear to warrant a resubmission of this or a modified settlement agreement." (A211).

CONCLUSION

The stay should be vacated and defendants enjoined from pleading in bar of this suit any judgment that may be entered in *Shapiro v. E.R. Black* and releases executed thereto. The suit should be transferred to the District of Connecticut.

Respectfully submitted,

NETTER & SPIEGEL
*Attorneys for Plaintiffs-
Appellants*

Mathias L. Spiegel
Of Counsel

**FEDERAL COURT
SECOND CIRCUIT**

Index No.

LOUIS BLECKER

Plaintiffs-Appellants.

- against -

Affidavit of Personal Service

**LAZARD FRERES & CO., MEDIOBANCA BANCA KI
CREDITO FINANZIARIO SOCIETA PER AZIONI, LES
FILS DREYFUS ET CIE, S.A., LAZARD FRERES ET CIE,
INT. TELE. AND TELE CORP., R.E. BENNETT,
E.R. BLACK, R.L. BRITTENHAM, G.R. BROWN,
F.J. DUNLEAVY, R.F. ERICKSON, H.S. GENNEEN, A.M. HILL,
J.P. LANNAN, R. NEWTON LAUGHLIN, J.A. McCONE, RS PERKINS
H.PERRY, W.L. PIERSON, F.G. ROHATYN,, T.B. WESTFALL,**

Defendants-Appellees.

STATE OF NEW YORK, COUNTY OF NEW YORK

ss.:

I, Reuben A. Shearer being duly sworn,
depose and say that deponent is not a party to the action, is over 18 years of age and resides at
211 West 144th Street, New York, New York 10030

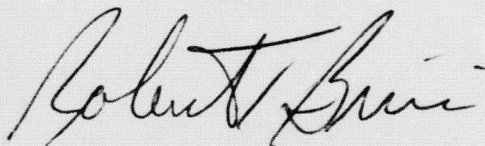
That on the 10th day of January, 1977 at 1, 100 Park Avenue; New York, N.Y.
2, 345 Park Avenue; New York, N.Y.

deponent served the annexed


1, Wormser, Kiely, Allessandroni, ^{upon} Mahoney & McCann

the in this action by delivering a true copy thereof to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the herein,

Sworn to before me, this 10th
day of January, 19 77



ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977


Reuben Shearer